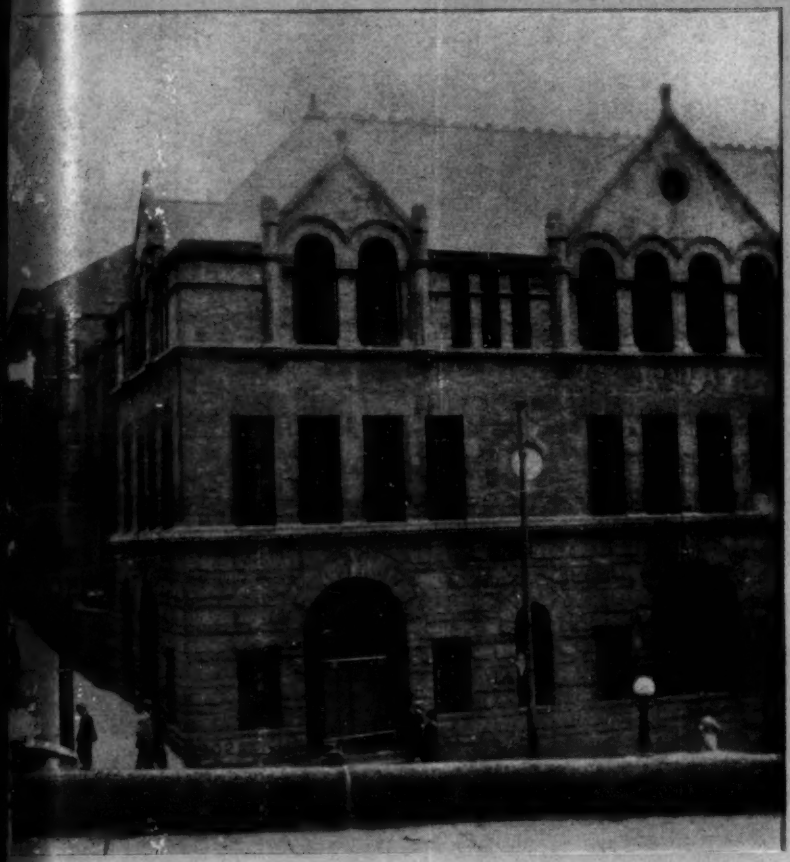

APRIL 1960

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The Los Angeles BAR BULLETIN

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The Los Angeles BAR BULLETIN

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THE PRESIDENT'S PAGE

☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ GRANT B. COOPER

» » THE BAR, as well as the Bench, has recently become exercised over the question of whether current customs and practices of the public information media in reporting the news of legal proceedings, particularly criminal cases, tend to hinder rather than help in the achievement of real justice and fairness.

If what the public is furnished by means of newspaper accounts, by television presentations, or through radio reports constitutes an invasion of the legal and moral rights of those involved, who—if anyone—is to blame?

Is it the press?

Is it the Bar?

Some think the press is mostly to blame; others point the finger at the sometimes antic behavior of some elements of our profession who occupy one end or the other of the counsel table.

The State Bar of California's Committee on Fair Trials is striving to point the way toward correction of such evils as exist in this field.

The Committee, headed by the distinguished Herman F. Selvin, recently began consideration of a proposed rule which says in part:

> "A member of the State Bar whether engaged in private practice or public employment shall not . . . make or sanction . . . any press release, statement or other disclosure of information . . . relating to any pending or anticipated civil action or proceeding or criminal prosecution calculated; or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or with due administration of justice."

Our esteemed colleague, Mr. Joseph A. Ball, explored the problem in scholarly and objective fashion in an address before the Fresno County Bar Association on May 24, 1957. His remarks were reported in the State Bar Journal for May-June of that year.

I am inclined to agree with Mr. Ball's statement at that time — and which is true in 1960—that ". . . It is an undeniable fact that freedom of the press or the freedom of lawyers to discuss pending trials in newspapers

has resulted in trial on the front page rather than in the courtroom."

As has been pointed out, legal contests should be conducted in at least as fair an atmosphere as prevails in, for example, athletic events where prejudiced arbiters are unknown. Yet sensational publicity of criminal trials and some civil contests poses the most serious threat to due process since that vital concept was promulgated.

After all, they are not athletic contests, nor are they political struggles, as is stated in *Bridges vs. California*, 314 U. S. 252, as follows: "Legal trials are not like elections to be won through the use of the meeting hall, the radio and the newspaper."

Since, I am sure my legal brethren will agree, "the place to try a lawsuit is in the courtroom," a more sincere effort to observe the canons of the American Bar Association, the American College of Trial Lawyers, and our own State Bar would seem to be the best place to start correcting some of the abuses which currently exist.

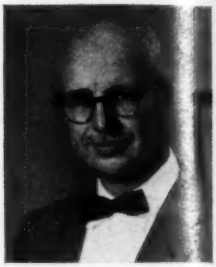
It is true that the United States Supreme Court held in the Bridges and the Times-Mirror contempt cases that it is not contempt to utter expressions relating to pending matters unless it can be shown that they create a "clear and present danger" that they will bring about disrespect for the judiciary or unfair administration of justice.

But it seems to me that many of these printed comments on pending cases which are to be deplored as possibly affecting the outcome of litigation would be lessened if not eliminated should members of the bar refrain from participation in what is being called "trial by newspaper." I am sure it would not be necessary to discuss in detail the limitations upon pre-trial statements by lawyers which, if observed, would insure that trials would be conducted in courtrooms rather than on front pages or television.

FRONT COVER

This month's cover continues our series of historical scenes of old Los Angeles. The picture, taken about 1902, shows the old County jail at the corner of Buena Vista and Temple Streets. Photograph courtesy of Title Insurance & Trust Company (Los Angeles).

The United States and the International Court of Justice



By CARL Q. CHRISTOL[1]

Introduction

» » THE ATTENTION OF thoughtful Americans is again being focused on the role of the International Court of Justice. President Eisenhower in his state-of-the-union message of January 7, 1960, called attention to this nation's limited access to the Court, and urged the prompt passage of a Senate Resolution whereby the so-called Connally amendment of 1946 would be repealed. In 1946 the United States voluntarily accepted the Court's compulsory jurisdiction subject to the right to determine unilaterally whether a dispute is essentially within its domestic jurisdiction.

The resolution referred to by the President was that introduced by Senator Hubert H. Humphrey of Minnesota in 1959 with the support of Republican and Democratic members of the Senate. Since 1959 members of the Administration closest to Mr. Eisenhower, including Vice-President Nixon, Secretary of State Herter, Attorney General Rogers and others, have been advocating the repeal of the American self-judging reservation.

The attack on the Connally amendment has been bi-partisan and widespread. Such bodies as the American Bar Association, in particular its Section on International and Comparative Law, and the American Society of International Law, have long been on record in favor of a fuller participation in the work of the Court by the United States.

Nature of the Problem

The broad problem is to determine whether the Court, as the principal judicial instrument of the United Nations, is able to be an effective device for resolving international disputes. In the presence of unrivaled demands in the United States for a rule of law in world affairs to supplant the rule of force, is the Court capable of serving as a dispute-resolving and peace-securing institution? Can its potential be put to use?

The immediate problem is for Americans to determine whether the potential of the Court is adversely affected by the self-judging aspect of the present reservation. In terms of our national interest the question is whether and under what conditions the United States should grant to the Court, and thereby commit itself to the rule of law in world affairs, the power to exercise jurisdiction over international legal disputes to which we are a party.

[1]Professor of International Law and Political Science, University of Southern California; Member, Los Angeles, California, South Dakota, and American Bar Associations; Member, American Society of International Law.

Prior to and at the time of the San Francisco Conference many able statesmen debated the ultimate role of the United Nations. In looking back over their work it is now clear that they intended to and did create a limited international institution. The most obvious evidence of this fact is the content of Article 2 (7) of the Charter which provides that the United Nations may not deal with matters which are essentially within the domestic jurisdiction of the member states.

Many of the smaller states at San Francisco, including a majority of all states present, sought nonetheless, to establish an international court which would have automatic, i.e., compulsory, jurisdiction over international legal disputes. Such jurisdiction, if possessed, would have prevented a state from unilaterally divesting the Court of jurisdiction in legal disputes in which the particular state was involved. However, the United States and the Soviet Union, apparently fearful that Article 2 (7) did not afford that form of protection which they thought their vital interests required, joined hands to prevent the Court from receiving automatic jurisdiction. Thus, the Statute of the Court made provision for optional jurisdiction. Members of the Court were given the power, at their election, to confer upon the Court compulsory jurisdiction over all international legal disputes, or only those which they considered to be commensurate with their public needs. Almost all of the members have attached to their acceptances the proviso that the Court shall not have the power to deal with international legal disputes which affect the domestic affairs of the respective nations.

When the terms of the American declaration accepting the jurisdiction of the Court came before the Senate in August, 1946, further fears were expressed respecting the range of subjects falling within the concept of "domestic jurisdiction." In view of the alleged uncertainty as to whether certain enumerated subjects were domestic or international in nature, the Senate, following the lead of Senator Connally—who in turn was relying upon a memorandum filed with the Senate by Mr. John Foster Dulles—decided to reserve to the United States the right to determine what was a domestic matter. In view of the fact that the United States in accepting the Statute of the Court had agreed pursuant to Article 36 (6) that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court" some delicate legal and political problems were thereby created.

When the "World Court Compulsory Jurisdiction Resolution" was before the subcommittee of the Senate Committee on Foreign Relations, Senator Warren R. Austin had proposed that the United States should determine for itself what matters were "essentially within the domestic jurisdiction of the United States."[2] In testimony before the Committee the late Dr. Lawrence Preuss, professor of international law at the University of Michigan stated that this proposal constituted "an extremely retrogressive step and would be taking away with one hand what we purport to be giving with the other."[3] In accepting the wisdom of this point of view the committee report declared that such a reservation would "tend to defeat the purposes which it is hoped to

[2] *Hearings on S. Res. 196 Before a Subcommittee of the Senate Committee on Foreign Relations*, 79th Congress, 2nd Session, p. 36 (1946).
[3] *Ibid.*, p. 84.

achieve by means of the proposed declaration as well as the purpose of article 36, paragraphs 2 and 6 of the Statute of the Court."[4]

However, on the floor of the Senate an amendment was proposed by Senator Connally whereby proviso *"b"* of the American Declaration, accepting the compulsory jurisdiction of the Court on matters contained in Article 36 (2) of the Statute, was modified to permit the unilateral and continuing control of the United States respecting the meaning of "domestic jurisdiction." Thus, proviso *"b"* which in its original form read "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States" was amended to include *"as determined by the United States."*[5]

It should be noted that Article 36 (2) of the Statute gave the Court jurisdiction over all legal disputes concerning (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, and, (d) the nature or extent of the reparation to be made for the breach of an international obligation. The conflict between the provisions of the Statute, particularly Article 36 (6), and the Connally amendment, are readily apparent.

Arguments for Repeal

The following views have been expressed by those who favor the elimination of the self-judging reservation from the American declaration accepting the compulsory jurisdiction of the Court. First, the American reservation respecting compulsory jurisdiction exists in relation to any other state accepting the same obligation. The United States, having accepted jurisdiction on the basis of reciprocity, accords to any other state the use of the Connally amendment against the United States. Senator Connally's view that the United States needed such a reservation because it was and would be a party defendant, and needed some way to prevent raids by foreign countries on the American Treasury, has proven to be inaccurate. As a recent bar association report has pointed out:

> Thus, the United States which has a larger stake in investments abroad and in military bases abroad than any other nation . . . has . . . prevented itself from utilizing, in its own behalf, the International Court of Justice. This does not seem to make good sense.[6]

Without the amendment the Court would be in a position to provide greater legal security to extensive American foreign interests.

Second, the Court in almost every case coming before it has been obliged to rule on its jurisdiction, and has displayed a conservative outlook respecting the extent of this jurisdiction. An analysis of the cases involving jurisdictional matters clearly discloses that the Court has not and will not depart from long accepted principles of international law. It is impossible to conclude that the Court through the application of international law could

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[4]S. Rep. No. 1835, 79th Congress, 2d Session, p. 5 (1946).

[5]92 *Congressional Record*, pp. 10624, 10841. For a fuller account of the legislative history one should consult Lawrence Preuss, "The International Court of Justice, The Senate, and Matters of Domestic Jurisdiction," 40 *American Journal of International Law*, p. 736 (1946), and Francis O. Wilcox, "The United States Accepts Compulsory Jurisdiction," *Ibid.*, p. 699.

[6]American Bar Association, Section of International and Comparative Law, *Report on the Self-Judging Aspect of the United States' Domestic Jurisdiction Reservation with Respect to the International Court of Justice*, p. 55 (1959), hereafter cited as "International and Comparative Law Report."

confuse domestic and international matters as they now stand.

It is unreasonable to believe that the Court could misconceive, through judicial misunderstanding of the law or otherwise, the present meaning of "domestic jurisdiction." The competent international lawyers who compose the Court are quite aware that such problems as immigration, tariffs, and the Panama Canal have been traditionally held to be matters of our own domestic jurisdiction. Thus, many persons object to the self-judging domestic jurisdiction reservation because it needlessly casts doubt on sufficiently clear international legal rules and principles, even though the doctrine of "domestic jurisdiction" is much like many domestic legal rules and principles, not universal nor absolute in content.

A related position is that through the reservation the United States violates the fundamental doctrine of equality before the law. It is urged that the United States through the reservation has constituted itself both judge and jury in its own case—thereby divesting the Court of a legitimate judicial function. This position has raised serious questions of American good faith respecting its frequent protestations that it is a law abiding and a law respecting nation. As Sir Hersch Lauterpacht, formerly professor of international law at Cambridge, and a recent member of the Court, has said, the spirit evidenced in the amendment represents a "vague apprehension of danger, as exhibited in this nervous quest for security from law, which is difficult to comprehend."[7]

In short, it has been urged that through the amendment the United States continues to forward an ambivalent attitude. The amendment has been widely cited as an illustration of the difference between America's allegedly superficial acceptance of democratic ideals and the extent to which such ideals are actually practiced in world affairs. In this sense the mere existence of the reservation, visible as it is in the area of world diplomacy, suggests to some nations and proves to others no less observant, that the United States in the final analysis is irrevocably committed to a nationalistic rather than a community viewpoint in international legal affairs.

Another criticism of the reservation has been raised by preeminent legal scholars. They ask whether the reservation is not inconsistent with American acceptance of the Statute, and by inference, of the Charter itself. Two common law trained judges on the Court maintain that the reservation is so inconsistent with American obligations under the Statute as to render null and void the whole of the American declaration accepting the compulsory jurisdiction of the Court. On the other hand, Judges Klaestad (Norway) and Armand-Ugon (Uruguay) have adopted a somewhat more limited view of the meaning of the reservation. They agree that the reservation is invalid but conclude that this does not invalidate the balance of the American declaration.

A serious criticism of the reservation is that it could be used to oust the Court of jurisdiction in a case brought before it by the United States. Since the United States has accepted jurisdiction on the basis of reciprocity, the Connally amendment can be claimed by states which have not included such a provision in their own acceptance. Thus we have unwittingly conferred upon defendants the power to prevent the Court from taking jurisdiction in important matters in which

[7]Quoted by Preuss, *op. cit.*, p. 734.

we may be called upon to protect our vital foreign interests.

The Connally amendment has provided other states with an excuse to file similar declarations restricting the jurisdiction of the Court. One of the six foreign states which have followed the American example has withdrawn its self-judging reservation, namely, France. It did so after Norway had prevented the Court from taking jurisdiction in the *Loans* Case through reciprocal recourse to the French self-judging provision. The present French reservation excludes from the compulsory jurisdiction of the Court only those "disputes relating to questions which, by international law, fall exclusively within the domestic jurisdiction."[8]

The American reservation, by the impetus it has given to these other states, as well as by its own terms, has caused the Secretary-General of the United Nations to declare that it is capable of rendering the whole system of compulsory jurisdiction virtually illusory. One may well inquire if American self-interest is served by such a prospect.

Another criticism of the amendment has to do with the delicate constitutional relationship between the Executive and Legislative branches of our own government in the area of foreign affairs. Those who urge the repeal of the amendment believe that repeal would reduce the possibilities of friction between our own political departments. The American separation of powers doctrine is subtle and even fragile, and the amendment in imposing unneeded legislative conditions upon the executive's constitutional management of foreign relations is able to impede the effective protection of American rights abroad. This problem was illustrated by the need, on the part of the Department of State, to invoke the amendment in the *Interhandel* Case, although the best interests of the United States dictate that this matter be resolved through adherence to the rule of law in international legal disputes.

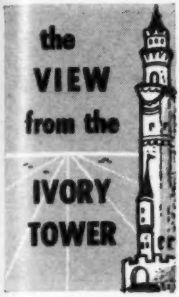
Finally, the reservation is at best unnecessary. Even if the Charter did not establish procedures whereby the United States might protect itself against international judicial harm to its truly vital interests, as it does do, the United States has reserved the right to leave the Court upon six months advance notice. The use by the United States of its veto in the Security Council to vitiate a decision of the Court, is, of course, an unthinkable thing. Thus, it is urged that the United States should have confidence in the integrity of the Court in determining what in fact constitutes the legal concept of "domestic jurisdiction." This should be weighed in the light of the observation that "There is no hope for permanent peace unless the nations of the world are willing to submit their disputes insofar as they involve issues of international law to the World Court for final determination."[9]

The foregoing views have received general approval. Vice-President Nixon several occasions has emphasized the point that international disputes over the meaning of international agreements could better be resolved if the Court possessed a wider jurisdiction and that a modification of the Connally amendment would contribute to this end. Mr. Henry R. Luce has been an outspoken opponent of

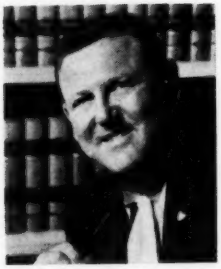
(Continued on page 197)

[8]International and Comparative Law Report, *op. cit.*, p. 23, footnote 2.

[9]Wayne L. Morse, "International Justice through Law," 26 *Oregon Law Review*, p. 7 (1946).



Some Thoughts and Questions On Education for Professional Responsibility



By MURRAY L. SCHWARTZ

Professor of Law and
Assistant Dean
U.C.L.A. School of Law
Los Angeles, California

» » A GOOD DEAL has been written recently about the asserted lack of training in law schools for professional responsibility. Serious efforts have been made to institute programs to this end. Important conferences have been held and committees created from which reports and recommendations have issued. The results have been far from satisfactory to date.

Why is there now this apparent pressing need for academic training for professional responsibility? Is the internal discipline of the bar at a low ebb at the present? Ethics and grievance committees are certainly as active as at any time in the past. Have the practicing standards of the bar fallen from what they have been in the past? No student of the history of lawyers and the legal profession in the United States could answer this question in the affirmative.

Perhaps there are two different answers: one educational, the other professional.

When men became members of the bar through law office experience only, before the modern law school was established, their formal training was also their practical training. They lived the practice of the law and thereby learned its code of practice. On the other hand, when law schools first became important in the education of lawyers, the educational system did not purport to do more than expound upon what the law was. It was only with the rise of the case system, with the examination of law as it actually develops, with deeper insights into the formation of legal decisions and the lawyer's role in their formulation, that the law schools undertook a dual role, whether they purported to do so or not: not only were they attempting to educate about the law; they were also attempting to educate as to how the law came to be, with particular emphasis on the adversary system. As a consequence, the law schools themselves have become

increasingly concerned about the possible distortion which this emphasis on the adversary system has created among their students.

In a chronologically parallel fashion, the nature of the legal profession has changed. The numbers of lawyers employed by corporations or governmental agencies has increased, as has the size of the average firm; the number of individual practitioners has suffered steady attrition; there has been a continuing increase in the specialization of the bar: all of these are significant changes when set against the fact that the professional traditions developed in a quite different setting.

It may be, therefore, that the bar's present drive for more education in professional responsibility is a result of the recognition by the bar itself that the pressures of modern practice require more than ever before a broader and firmer ethic, a more solidly established *modus vivendi*, if the bar is to continue to justify its status of "profession." Those members of the bar who are leading the campaign for more education in professional responsibility appear to be no longer satisfied with the status quo. They are seeking the bar's self-improvement.

Granting that both law schools and the bar seek to raise professional standards, what is it that the law schools should or can do?

At the "lowest" level, the law schools can teach the present rules of the game, ethics or etiquette, as they may be: the Canons of the American Bar Association and the California Bar's Rules of Professional Conduct. Yet an analysis of these rules leads to the conclusion that even if students were required to memorize them or to have them read aloud once a week, like the Articles of War on a Naval vessel of old, no substantial achievement would have been made.

Take, for example, the Rules of Professional Conduct. These are an interesting collection of "Thou shalt nots." For every Rule, with the exception of No. 1, the preamble, begins with the clause, "A member of the State Bar shall not . . .". This is scarcely a very effective way of inculcating professional responsibility.

Consider also their substance. Roughly, half of these rules deal with solicitation and advertising and conflicts of interest. The others relate to "candor," commingling, secreting witnesses, advising the violation of a law, and litigating for the purpose of delay. With minor exceptions, these rules relate to conduct which is either criminal or would be considered unethical in any trade. They are necessary for true professional responsibility. They are scarcely its final measure.

Moreover, in practical fact (with the exception of occasional discipline for violation of the rules against advertising and solicitation) the majority of the sanctions for violations of these rules are imposed for conduct which is plainly criminal, such as embezzlement of clients' funds, or income tax evasion or morals offenses.

Certainly the law schools should not limit themselves to teaching when disbarment or suspension will follow as a realistic matter: the lowest common denominator of the profession. But once this area of certainty is left behind, what should be taught about professional conduct?

The literal rules or canons are not much help except for obvious cases. There are few judicial decisions. The various Committee opinions seem most concerned with the same sub-

jects as the Rules of Professional Conduct: solicitation and advertising and conflicting interests. Outside these areas (and even here there is no mean never-never land) there are few formally expressed and approved guidelines.

The question of what should be taught within the farmework of the rules really becomes, *whose* ethics should be taught? Consider the setting of the problem.

An entering law school class is usually composed of three groups: the "idealists," the "cynics," and the great undistributed middle which has little or no idea of what the law or the practice of law is all about. Yet all three groups have one characterstic in common: in the field of professional ethics or responsibility, they want to know what they *should* do. Here, perhaps more than any other course in the curriculum, students want answers. The law student becomes at least resigned to the Socratic, few-answer type of teaching in his other courses. For he comes to realize that this is the stuff the law is made of. But when it comes to his own personal conduct, this is not enough. These are decisions he cannot transfer to his client or a court. These are decisions which only he can make. He wants to know what those decisions should be.

The written materials offer little help in the search for these answers. Other sources must be sought. Three such sources are the instructor, the consensus of the bar, the leaders of the bar.

As far as the instructor is concerned, it is fair to say that few are so self-confident, even those who have had substantial experience in the practice, as not to hesitate in imparting their personal notions of "do's and don'ts" to their students. They are caught in the dilemma of not wanting to be too unrealistic or idealistic and yet trying to communicate some high standard or way of practice.

Is it feasible to refer to a consensus of the bar? What answer should be given to the student who, after class discussion of what the instructor thought was a particularly provocative problem, asks, "Sir, we could speculate about this all morning. Would you tell us what lawyers do in this situation?" What, for example, should the instructor teach about the rule about never filing a pleading for purposes of delay? Here, the language of the rule is clear. Yet, how many members of the bar have never done just that? What about the stricture of Canon 15, that a lawyer should never assert in oral argument his personal belief in his client's innocence or the justice of his cause?

Should the instructor answer these questions, which are susceptible of unequivocal answers, according to the language of the rules or to his ideas of what the members of the bar actually do? No one, of course, knows what lawyers, or a majority of lawyers, or even a substantial number of lawyers, *do* in any particular, difficult situation. Even if the information were available, would it be relevant? If so, the basic materials used in any law school course in ethics should be the results of questionnaires or polls of members of the bar. A more important objection, however, is that the present drive for more education in professional responsibility seems to be dissatisfaction with the limited scope of the rules; that lawyers should do more than they are required to do under the rules.

If the instructor and a consensus of the bar are not appropriate sources for this kind of instruction, what about

bringing into the classroom eminent members of the bar to discuss their solutions to problems in their particular fields, to present their own philosophies or approaches to the practice of law?

Putting aside the discrimination implicit in this selection process, is it the best solution? Whenever a difficult problem is presented to two such persons, there is at least an even chance that there will be disagreement as to what constitutes proper conduct. But even were there unanimity, is it fair to limit law students to exposure only to the standards of the most successful, the most eminent? It will be a long time before the law school graduate will achieve the prestige and security of the leaders of the profession. Should the law schools which undertake this kind of instruction, limit it to the practice of the noblest of them all? Again, there is the problem of the search for the appropriate standard.

Once we venture into the broader, less "technical" areas of professional responsibility, the problem becomes inordinately more difficult or even insoluble.

Take, for example, an area of professional responsibility which is not so far removed from the lawyer's daily work as some: the problem of providing legal services to the poor or the unpopular defendant or cause. The rules here are somewhat conflicting, although the practice is clear. Section 6068(h) of the State Bar Act states that a lawyer has a duty "Never to reject, for any consideration personal to himself, the cause of the defenseless or oppressed." The ABA Canons, on the other hand, make it quite clear that no lawyer need ever take any case, regardless of his reason for refusing. In fact, non-personal institutions have been created for these purposes: Legal Aid, Public Defender, Federal Indigent Defense Panels; oc-

casionally, particular lawyers are appointed by courts for particular cases. Each of these approaches is a meritorious one; but does not each result in an escape by individual members of the Bar from personal professional responsibility? What should an instructor teach about this duty to represent the unpopular? Should he refer to Section 6068(h), to the ABA Canons, to the consensus of the bar, to the practice of the leaders of the bar, or to his own thoughts about professional responsibility?

Another, even broader area of professional responsibility has recently been repeatedly emphasized: the duty of the lawyer to take part in public affairs. The thought here is that because of their experience and training and consequently potentially valuable contribution, lawyers should recognize a professional duty to contribute to the political and social life of the day. Thoughtful participation by those inculcated with precision of analysis and the ability to separate the relevant from the irrelevant is deemed highly desirable so that the policy decisions which confront us shall be reached in the most intelligent manner. Therefore law students should be encouraged to become publicly active. A recent eight day conference on this theme at Boulder, Colorado, among law school professors, members of the bar and several who are eminent in other areas has resulted in the publication by the Association of American Law Schools of a report of that conference, Stone, *Legal Education and Public Responsibility.*

Yet reading this report leaves one with a number of questions.

Is this encouragement really necessary? Every study of lawyers indicates that they now play a predominating role in political life and the affairs of the day.

Are all lawyers, merely because they are lawyers, particularly qualified to engage in public affairs? True it is that lawyers bring a "trained and disciplined mind" to the problems they undertake. But does that give them so much more insight into the affairs of the day as to warrant a mass exhortation at participation?

Legal Ethics is, as the term is used today, a composite of three overlapping concepts: etiquette, legal ethics in a traditional sense and professional responsibility. Yet in each of these areas, with the exception of certain clear, untroubled negatives, the same basic problem appears: whose standards are to be used as a frame of reference in the educational process? In the present effort of the bar to continue to identify itself as a profession, with unique professional goals, the law schools want to help. But the task is not an easy one.

At present, the only reasonable solution seems to be the familiar one of compromise: to attempt to project every point of view. This proposal presents the serious pedagogical difficulty of dilution. Conceivably, it could result in a student body which concludes that in view of the contrariety of views, there is no point in attempting to adhere to any ethical or professional standard. More probably, it will have a beneficial effect. It can do no harm to the "cynics," and perhaps will educate them to be wary of conduct which they might not otherwise avoid. The "idealists" will have the assurance of knowing that they are not alone in their reaching for a higher way of professional life. And the "great undistributed middle" will be better able to work out their own ways of professional life from the spectrum which is presented to them.

tax reminder

By EDWARD R. McHALE

Member of the Committee on Taxation of the Los Angeles County Bar Association. Assistant United States Attorney, Chief, Tax Division, Southern District of California. The opinions expressed are those of the writer and do not necessarily represent the views of the United States Department of Justice or any department or agency of the United States Government.

Lurking Liability of a Decedent's Estate and Its Representative for Their Federal Taxes and Those of the Decedent

» » ATTORNEYS COUNSELLING representatives of decedents' estates are usually mindful of the obligation of their clients to satisfy the estate tax liability, the income tax liability of the estate, and other federal tax liabilities of the decedent as priority claims where the Government has filed claims in the estate. Cal. Prob. Code Section 950. Less familiar are the federal civil sanctions looming over the representative who, in the absence of a "timely" Government claim, or any claim at all, pays lower priority creditors or distributes an estate leaving federal tax liability unsatisfied. Under Revised Statutes, Sections 3466 and 3467 (Title 31 U.S.C., Sections 191 and 192), an executor or administrator who makes such payments could be personally liable for a penalty for such payments to the extent that the liabilities to the United States remain unpaid.[1] To this day, the degree to which knowledge by the representative of the debts due the United States is necessary to hold him liable is uncertain, although the basic statute has been in existence without substantial change since 1789!

Circumstances giving rise to the possibility that the decedent may not have satisfied his federal tax liability, which are sufficient to put a representative on inquiry, could be enough to invoke liability. In view of this generally accepted criterion, it would not be safe for representatives in the following situations to pay debts without satisfying themselves that there is no lurking federal tax liability. For example, occasionally a representative is appointed who finds that a decedent leaving a substantial estate has never filed an income tax return. Again, a

[1]In pertinent part, R. S. §3466 reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the exectuors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; . . ." Section 3467 reads as follows:

"Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

representative may learn an audit is under way with respect to income or other tax liability of the decedent. Or, an administrator's examination of the decedent's records and papers may reflect established or potential tax liability. Or again, by reason of an executor's close relationship to decedent he may have knowledge of tax liability.

The representative may not, with respect to the United States, depend upon the time limitations for the filing of claims against the estate imposed by the Probate Code to bar later federal tax claims. Because of its sovereignty, the United States is not bound by state statutes of limitation.[2]

The representative of an estate who has facts sufficient to put him on inquiry of a possible tax liability of the decedent, regardless of the state bar of limitation dates, should not pay debts of the estate if by so doing insufficient assets would remain to pay the tax indebtedness.

Whether such personal liability of the executor or administrator also follows upon distributions of the decedent's estate to heirs or legatees is not a settled question although the tendency of the courts is to impose liability.[3] That is not to say that the Government could not proceed against the distributees, in any event, as transferees.

In the presence of a federal tax liability and an estate insufficient to pay all the debts, the representative of the estate must be careful in his decisions as to which expenses of administration and debts he pays. While the priority statute is not a lien statute and thus, certain expenses of administration are payable prior to the debts owing the United States,[4] the determination of what is a recognizable expense of administration does not rest on state law. *Estate of Muldoon*, 128 Cal. App. 2d 284 (1954). In *Estate of Muldoon*, although granted a priority status by Section 950 of the California Probate Code, the expenses of decedent's last illness were held not to be an expense of administering the decedent's estate within the gloss on 31 U.S.C., Section 192. On the other hand, the ordinary expenses of administering the estate, including expenses of burial and a family allowance, are recognized as prior debts by the Internal Revenue Service.[5]

The attorney for the representative of an estate which is authorized to continue a going business in operation, and the attorney representing a creditor extending credit to the representative should recognize that therein special responsibilities and liabilities to the United States confront the representative and the estate. In addition to the liability for taxes incurred in carrying on the going concern, there is the further liability impressed upon the assets of the estate for taxes of a trust fund nature such as those collected by the estate to be turned over to the United States. Since the representative acts in a fiduciary capacity under the internal revenue laws, it is not incumbent upon the United States

[2] *United States v. Summerlin*, 310 U. S. 414 (1940).

[3] *Compare Viles v. Commissioner*, 233 F. 2d 376 (6th Cir. 1956); *United States v. Munroe*, 65 F. Supp. 213 (W.D. Pa. 1946); *United States vs. First Huntington National Bank*, 34 F. Supp. 578 (S.D. W. Va. 1940) *aff'd.* 117 F. 2d 376 (4th Cir. 1941) and *United States v. Cruikshank*, 48 F. 2d 352 (S.D. N.Y. 1931) *with Edward G. Leuthesser*, 18 T.C. 1112 (1952) and *C. W. Posey*, 10 CCH Tax Ct. Mem. 383, 20 P-H Tax Ct. Mem. 367 (1951).

[4] *Kennebec Box Co. v. O. S. Richards Corp.*, 5 F. 2d 951 (2nd Cir. 1925).

[5] G.C.M. 4217, VII-2 Cum. Bull. 162 (1928); I.T. 2430, VII-2 Cum. Bull. 72 (1928); I.T. 2712, XII-2 Cum. Bull. 138 (1933); I.T. 2518, IX-1 Cum. Bull. 158 (1930); S.M. 5032, V-1 Cum. Bull. 109 (1926).

to trace the withheld funds but it may, instead, look to the assets of the estate for its commingled trust funds. *Estate of Dwyer*, 168 Cal. App. 2d 264 (1959).

In representing a decedent's estate, attorneys should realize in addition to the usually considered problems of the liability of the estate and its representative for the estate's taxes that the estate and his client have a responsibility for the proper payment and satisfaction of federal taxes incurred by the decedent and the representative, the disregard of which can lead to the imposition of serious sanctions found in federal statutes.

PHOTOGRAPHS – DAGUERREOTYPES–TINTYPES–SKETCHES–PICTORIAL MATTER

Each copy of the BULLETIN has a picture on it. There are twelve BULLETINS each year. We will need 240 pictures in the next twenty years. We cannot print courthouses and bar presidents forever. The title companies' supplies may run thin. Help us fill the graphic gap!

We would be happy to receive photographs, drawings, daguerreotypes, tintypes and other reproducible images appropriate for the BULLETIN's cover. We are particularly interested in the history of the Los Angeles Bar, but we would also welcome pictorial matter dealing with Los Angeles in general and the history of the State Bar.

All material sent to us will be returned undamaged. If you have a collection which would be impractical to mail, call the office of the Association and a member of the BULLETIN committee wil examine the collection at your convenience.

The picture on the cover of the March BULLETIN came from the Collection of Historical Photographs of Title Insurance and Trust Company (Los Angeles).

Continuing Education of the Bar Spring Program Announced

» » THE LOS ANGELES County Bar Association, in cooperation with the State Bar, again is sponsoring locally the State Bar's program of continuing education for lawyers. The Spring, 1960, program will have as its subject, "Trial Procedure in Civil Cases." Four 2-hour lectures by leading members of the bar and bench will be presented. The lectures will be given in the Auditorium, California Teachers Association Building, 1125 West Sixth Street, Los Angeles.

Registrants will have a choice of attending either week-night sessions or a weekend session. The week-night sessions will be held on April 28, May 3, May 5, and May 10, beginning at 7:30 P.M. The weekend session will be held on Friday afternoon, June 3, beginning at 1:30 P.M., and on Saturday morning, June 4, beginning at 9:00 A.M.

The registration fee is $20.00. Each registrant will be mailed the new 800-page California Practice Handbook on CALIFORNIA CIVIL PROCEDURE DURING TRIAL as soon as it is delivered by the printer. This handbook will contain 25 chapters devoted to the major procedural aspects of civil trials, both jury and non-jury. After the lecture series ends on June 4, 1960, the price of the handbook (if any copies remain) will be increased.

A leaflet showing the subject of each lecture and the names of the lecturers, together with a registration form, has been mailed to all California lawyers. Additional registration forms and information can be obtained from University Extension, 813 South Hill Street, Los Angeles 14.

In Memoriam

Louis W. Myers, 1872-1960

The Bar of the City of Los Angeles has recently lost one of its most distinguished members, Judge Louis W. Myers. The following remarks of William W. Clary, another eminent member of the local Bar, and long-time associate of Judge Myers, were delivered at a Memorial Service held February 18, 1960.—THE EDITOR.

FRIENDS AND ASSOCIATES OF JUDGE MYERS:

There is nothing that brings people together so much as some sorrow, or it may be some joy, which all share in common. Today I think we may have something of both sorrow and joy in our hearts.

It is of course inevitable that we should all feel a deep sense of sadness at the passing of one with whom many of us have been so closely associated for so many years and whom we all held in affection, admiration and respect.

But over and above our sadness we cannot help but be dominated by a sense of satisfaction for the completeness of Judge Myers' life. It was complete and fine in every way. He lived 87 years. He achieved the highest distinctions—far more than most men. He lived his life to the full and he enjoyed it to the very end. Last Friday morning he came to the office as usual at 9:00 o'clock. Saturday he went to the harbor to look over the boat which he loved so much. Monday he passed quietly away. His course was finished.

And today we are also dominated by a deep sense of gratitude for the privilege that was ours of knowing Judge Myers—of learning from him and enjoying the boon of his friendship. And we cannot help but be glad that he lived—and that he belonged in one way or another to each one of us.

Judge Myers was born in the little village of Lake Mills, Wisconsin, September 6, 1872. He attended the University of Wisconsin where he made a brilliant record.

He told me not long ago that he was elected manager of the college football team and that later he was elected manager of the baseball team. He said this experience did him a lot of good but he could not imagine why he was elected because he had no business ability. He thought perhaps it was because he never charged the athletic association for railroad fare when he rode on a pass although this had always been considered a perquisite of the office.

I mention this small incident as an early example of the integrity which marked him through life. It was not just ordinary honesty, but a basic and profound integrity of mind and spirit that rose far above the level of the street or the market place.

During his law school course he clerked in the office of Senator John C. Spooner for whom he retained an intense admiration and affection throughout his life.

He was admitted to the Illinois bar in 1895. Shortly after that time he

came to California ôn account of his mother's health and he was admitted to the California bar on motion on the strength of a letter from Senator Spooner.

He started to practice law alone in the old Laughlin Building at 315 South Broadway. He had no acquaintances and no influential connections but his practice grew steadily. I think it was because no matter how trivial the employment it was characteristic of him throughout his life that he would spare neither time nor effort to do the best possible job for his client.

He was never a politician in the usual sense but was deeply concerned about good government and he became a member of the Executive Committee of the Municipal League and President of the Los Angeles City Club. Both these organizations were active at that time in bringing about better government in California.

In 1913 he was appointed as judge of the Superior Court of Los Angeles County. He accepted this appointment at a financial sacrifice but again it was an example of his lifelong sense of duty and responsibility.

My own acquaintance with him began in 1914 when I appeared in his court. Perhaps I may be permitted to relate this incident. It was my first case in the Superior Court. I was a raw and youthful beginner. The decision was against me. Worse than that, I was for the plaintiff in the case and Judge Myers granted a motion for nonsuit at the conclusion of the presentation of my testimony. But in so doing he explained to me in the kindliest manner, the exact reasons why he granted the motion and the exact points wherein I had failed to establish my case. I have never forgotten this double lesson in judicial courtesy and in the basic principles of the law applicable to this type of case.

Judge Myers quickly became known as one of the ablest judges on the court and in January 1923 he was appointed as associate justice of the Supreme Court. And here I should like to mention another personal incident or I might call it a co-incident. The first case in which Judge Myers wrote the court's opinion as a justice of the Supreme Court was a case which I had briefed and argued before the court. It was, as it seemed to me, an act of poetic justice that on this occasion the decision was in my favor.

In March 1924 the office of chief justice became vacant. Judge Myers once told me about his appointment. He said that the governor came down to San Francisco and visited each of the six judges. He was the last one on whom the governor called. He said that he told the governor frankly that he did not think that he ought to be appointed—that he was the youngest member of the court both in age and period of service and he thought that one of the older judges should receive the appointment. This of course was a typical example of the extreme modesty which characterized him throughout his life. But in spite of his modesty two days later he received the commission from the governor appointing him as chief justice. Never was an appointment made that was based so completely on merit.

He plunged into the work of chief justice and inaugurated many reforms which improved and speeded up appellate court procedure. He was generally recognized as one of the ablest of our chief justices and perhaps I may be permitted to say without reflecting on the great ability of other judges who have held that office that he was the ablest chief justice in the

history of the California Supreme Court.

But his sense of duty and responsibility was so strong and the work he took on so demanding that his health soon broke down and he was forced to resign at the end of December, 1925. In the year and nine months he had served as chief justice besides reforming court procedure and performing other duties of the chief he had himself written the opinion in forty of the court's decisions. And these opinions were not dashed off hastily but were conscientiously thought out and carefully written down.

After a much needed rest and after his health had recovered he accepted the invitation of his old friend and fishing companion, Henry W. O'Melveny, to become a member of the O'Melveny firm. Once he told me that next to his marriage this was the best thing he ever did. He joined the firm in 1927 and continued this association for more than 33 years. Indeed until Monday of this week.

Most of his work until 1945 was in handling cases in the appellate courts where he made an almost unbelievable record of victories. His arguments were always clear, lucid and were usually restrained. I say, usually, because on rare occasions when he thought his opponents were not forthright in their arguments he would reply with a most astonishing vigor and would give vent to a righteous indignation that swept away all sophistry. It was a wonderful experience to hear him on these occasions.

Since 1945 he has assisted in the preparation of briefs, in counseling and advising and often has sat with the trial attorneys in court trials and advised them in the handling of their cases. I have had the inestimable privilege of having him sit at the counsel table with me on numerous occasions during the trial of contested lawsuits. Never did a trial lawyer have so able a counselor.

So he ended his practice and was active and useful, as I have already said, almost to the last day of his life.

And now that his life is finished we can carry with us many wonderful and happy memories of Judge Myers.

We can think of him in terms of his extreme devotion to his family;

We can see him on the bench as a kind but firm, able and just judge;

We can remember him in his office in consultation and discussion with other lawyers over difficult law points where with unerring intellectual integrity he always distinguished the true from the false;

We can hear him arguing in the Supreme Court with masterly logic and vigorous clarity of presentation;

We can think of him fishing in the trout streams in northern California and Oregon or enjoying the mountains at his cabin at Big Bear Lake.

But perhaps the most pleasant memory of all is of seeing him standing on the deck of his small ship looking out over the open waters of the Pacific Ocean.

As I recall this picture my mind turns instinctively to the beautiful lines which I have always loved and with which I should like to close:

Under the wide and starry sky
Dig the grave and let me lie
Glad did I live and gladly die
And I lay me down with a will.

This be the verse you grave for me,
Here he lies where he longed to be.
Home is the sailor, home from sea,
And the hunter home from the hill.

notes from your Law Library

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

ATOMIC ENERGY: *Atoms and the Law,* (1512 p.) is the result of a long-time project at the University of Michigan. Most of the volume is devoted to tort liability and workmen's compensation. There are also extended sections on the state regulation of atomic energy and the federal statutory and administrative limitations upon atomic activities. The final section is devoted to a consideration of international controls in the atoms-for-peace program.

BIOGRAPHY: *A. Lincoln, Prairie Lawyer* by J. J. Duff (Reinhart, 433 p.) is an account of Lincoln's life at the bar, a significant career now obscured by his greater fame as President. The work is the result of research in the court houses of the circuit in Central Illinois where Lincoln practiced. There are many interesting illustrations.

CRIMINAL PROCEDURE: *How to Try a Federal Criminal Case* by Paul C. Matthews (Dennis, 2 v.) is an up-to-date work based on Housel and Walser incorporating changes of the last ten years, particularly in the field of the Federal Rules of Criminal Procedure. There are forms, an index and a table of cases.

EVIDENCE: *Evidence of Guilt: Restrictions upon its Discovery or Compulsory Disclosure* (Little Brown, 295 p.) by John M. Maguire of Harvard Law School explains and examines the forms of constitutional safeguards in chapters on the privilege against self-incrimination, involuntary confessions, illegally obtained evidence and the McNabb-Mallory rule in state and federal courts. The book is amply documented with footnotes, a table of cases and an excellent index.

EVIDENCE: *Evidential Documents* by James Conway (Thomas, 267 p.) discusses signatures, handwriting, typewriting and other materials useful in authenticating documents. The author is a questioned documents examiner for the U.S. Post Office.

INSURANCE: *The History of Automobile Liability Insurance Rating* by H. Jerome Zoffer (University of Pittsburgh Press, 282 p.) is a historical and statistical study of the way rates on automobile insurance have developed. Pennsylvania statistics are the basis of much of the information.

JURY INSTRUCTIONS: Reid's Branson on *The Law of Instructions to Juries in Civil and Criminal Cases* (Bobbs-Merrill) is being revised for the first time since 1936 by William Samore, Professor at the Cleveland-Marshall Law School. Volume I covers the rules governing the giving or refusal of instructions: province of court and jury, subject-matter, form and arrangement, pertinency, construction and effect, requests, preservation, and practical suggestions.

LABOR LAW: *The Legislative History of the Labor-Management Re-*

porting and Disclosure Act of 1959, 2 v. has been published by the National Labor Relations Board. It contains copies, in large print, or the bills, hearings, and congressional debate on the new labor law. The price is $6.00.

LEGAL HISTORY: *Edward I and Criminal Law* is a series of four lectures by T. F. T. Plucknett (Cambridge University Press, 104 p.) on reparation, crown rights and intent in as they developed in the Middle ages. Sir George Clark has edited a series of essays (Oxford University Press, 155 p.) on *The Campden Wonder*, a name given to the affair in Restoration England which saw three people executed on circumstantial evidence for the murder of a victim who returned alive after two years.

PRICE DISCRIMINATION: *A & P: A Study in Price-Cost Behavior and Public Policy* by Adelman, takes as its subject matter the legal, economic and social aspects of the 50,000 page record in U.S. v. The New York Great Atlantic and Pacific Tea Co.

QUOTATIONS: *Ragbag of Legal Quotations* compiled by M. Frances McNamara (Matthew Bender, 334 p.) is a collection of quotations arranged by subject. They come mainly from English and American sources, mostly from judges and lawyers with a few from Dr. Johnson, Finley Peter Dunne, and Shakespeare. There is a good index.

SECURITIES: The Assembly Interim Committee on the Judiciary—Civil has published a transcript of the hearings it held in San Francisco and Los Angeles on Assembly Bill 2531, the Uniform Securities Act as Proposed for Adoption for the State of California (2 v. mimeographed.)

SUPREME COURT: *The People and The Court: Judicial Review in a Democracy* by Charles L. Black Jr., (Macmillan, 238 p.) considers the purposes of judicial review in a period when it is being attacked from numerous quarters. The text is simple and direct, with a few references and an excellent index.

TRIAL PRACTICE: *Motions During Trial: The Anatomy of a Trial*, by H. H. Spellman, (Prentice-Hall, 362 p.) presents step by step approach to each stage of a trial and the kind of motions required. There are 317 forms of motions with supporting citations so that it is possible to check local jurisdictional requirements. The object of the l ook is to frame the motion in the appropriate legal language so that the issue may be raised adequately or preserved for the record.

the amendment. He has observed that the judges of the Court:

> . . . know as much about international law as there is to be known. Unfortunately, theirs is also the most unused court in the world. A preliminary reason for the scandalous neglect lies right on the door-step of the United States. [The Connally amendment] is bad law . . . [and] it is also bad foreign policy, with a built-in boomerang effect against American interests. The Connally Amendment has not only weakened the court by setting a bad example to other nations; it has robbed us of recourse to it. Until the Connally Amendment is amended, as the administration urges, our bad example will keep the court in its present scandalous idleness, and also frustrate any United States claim to be a champion of law in world affairs.[10]

Senator Jacob K. Javits of New York has summarized the situation as follows:

> We have available already much of the machinery needed to make a rule of law effective. We have a large body of international law, in addition to those basic concepts of law, order, and fair play that are common to virtually all civilized people. We have treaties with many nations based upon law and a respect for obligations duly assumed. We have the machinery of the United Nations and the International Court of Justice, in order to put into effect the rule of law among nations. And we have the basic, moral desire to do what is needed to create peace and well being. This above all is the great force for peace.[11]

Many similar sentiments have been expressed by countless Americans. Only through an effective international court can the rule of law be applied to international legal disputes.

Arguments Against Repeal

Those who feel that American interests can best be protected through the Connally amendment naturally reject many of the foregoing truths. They urge that one cannot be sufficiently sure, or positive (the language varies) that the Court will not interpret the term "domestic jurisdiction" so broadly—and like any other legal term it will require interpretation—that vital national interests may be adversely affected by its rulings. It is urged that the alleged uncertain future path of the Court, as well as the vague and general content of international law, make it a risky matter to confer such competence on the Court.

Another viewpoint is that the Court is composed mainly of foreigners. The judges do come from, but do not represent, fifteen different countries. Their individual environments, cultural, social, economic, religious, ethic, and legal backgrounds are not entirely uniform. Their value systems and their awareness of the world's different legal systems are not identical.

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[10]Printed in 105 *Congressional Record*, pp. 3423-3426, (March 11, 1959). Mr. Luce's views can also be consulted in "Our Great Hope: Peace is the Work of Justice," 43 *American Bar Association Journal*, p. 407 (1957), where he says at page 410 "The law is the indispensable vehicle of both idealism and national interest."

[11]Jacob K. Javits, "World Law is Imperative," *The Kiwanis Magazine*, p. 14 (Feb. 1960).

However, whether this natural diversity is so great as to prevent the existence of a fair and just rule of law in world legal affairs is certainly to be doubted.

The Court judges have a common background in an almost universal discipline—international law. Further, it is interesting to note that the present judges come from geographical areas where the Anglo-American common law system prevails (4), where variants of the Roman law system prevail (8), where the Soviet system prevails (1), where an Islamic system prevails (2), and where an Asian framework exists (2).[12] At the time of the last elections, the following were elected as judges: Armand-Ugon (Uruguay), Badawi (Egypt), Basdevant (France), Cordova (Mexico), Guerro (El Salvador), Hackworth (USA), Khan (Pakistan), Klaestad (Norway), Kojenvnikov (USSR), Koo (Nationalist China), Lauterpacht (United Kingdom), Moreno Quintana (Argentina), Spender (Australia), Spiropoulos (Greece), and Winiarski (Poland). Several of the foregoing judges who do not come from common law or civil law areas either studied in such areas or have had a considerable amount of practical experience in dealing with such legal systems.

From 1922 to the present the United States has always had an American national on the World Court, namely, John B. Moore, Charles E. Hughes, Frank B. Kellogg, Manley O. Hudson, and Green H. Hackworth. During this period at any given time a preponderance of the members of the Court have been well indoctrinated in the cultural and social values of Western Europe. Further, during the many years of the Permanent Court of International Justice it was never seriously thought that the quality of justice rendered by that Court was impeded by the national origins of its members. Judge Manley O. Hudson, as a result of his long membership on the Permanent Court and his careful analysis, has concluded that the judicial impartiality of full-time judges is an established fact. He has noted that on several occasions such judges have voted against the legal positions urged by their own country.[13] So far as the present Court is concerned, it is the observation of one author that national origins of judges have not affected the judicial and impartial quality of their decisions. He states that there has not been "party line" voting, and that the "scales of justice at the international level have generally been balanced with as pleasing a degree of impartiality as ever graced an American courthouse."[14]

It has also been urged that the judges might be made the target of national political pressures. It is possible that this may be true. Whether they might succumb to such pressures is a more difficult question. A number of factors are involved in such a charge. It is true that many of the judges have been closely allied with the governments of their own countries prior to acceptance of judicial appointment. Many, and some would urge too many, of the judges have served in the legal offices of their departments of foreign affairs. Others

[12]This apparent conflict of 15 judges and 17 systems is reconciled by the fact that a Pakistan judge's legal background reflects the Common Law, Asian, and Islamic traditions. A detailed analysis of principal legal systems represented on the Court during the period 1922-1954 is to be found in S. Rosenee, "The International Court and the United Nations: Reflections on the Period 1946-1954," 9 *International Organization*, p. 250 (1955).

[13]Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, Macmillan, New York, 1943, pp. 345-360.

[14]William Samore, "National Origins v. Impartial Decisions: A Study of World Court Holdings," 34 *Chicago-Kent Law Review*, p. 193 (1956).

have served their respective countries as prime ministers, supreme court justices, secretaries of foreign affairs, secretaries of justice, diplomats of high rank, and members of national parliaments. Others have been law school deans, professors of law, and private practitioners. Many have combined several of the above responsibilities. All have been lawyers. Frequently they have been members of the Permanent Court of Arbitration. All have had long experience in international legal matters.

Whether close association with the international legal problems of their respective nations has created a predisposition to accept their own nation's legal positions, if and when advanced before the Court, is to be doubted. These judges are the product of a tough, taut, legal tradition, and it is unlikely that their dedication to and their understanding of international law and the rule of law in world affairs could be reduced by political pressures. And even if this were assumed to be possible, the Court decides matters by a majority vote. On the other hand, it should be noted that frequently an *ad hoc* judge, designated by a nation which does not have an elected national on the Court in the event of litigation to which that nation is a party, does accept the legal position urged by his or the appointing nation.

Again, it has been urged that the Connally amendment should be retained because of the complex quality of international disputes. This position holds that it is next to impossible, if not impossible, to sever the legal qualities of a law suit from political and economic issues. The conclusion is drawn that the American reservation is required to prevent an admixture of such problems from being presented to the Court under the label "legal." Once again, it must be admitted, that disputes generally fail to present themselves to courts equipped with a ready-made, simple, and conclusive label. If this were possible it is indeed likely that there would be fewer disputes and a substantially smaller demand for the existence of courts, both at home and abroad. In American constitutional law the Supreme Court has created the cautious doctrine of "political disputes" whereby it refuses to adjudicate matters which are essentially political, or which are not regarded as expedient to handle. The doctrine of judicial self-restraint, which has also become a part of American constitutional law, has numerous counterparts in the jurisprudence of the World Court. The judges of the latter Court are just as aware, if not more aware than anyone else, that the success and even continued existence of their Court depends to an extraordinary degree upon their application of international law to international legal disputes.

The responsible attitude of the judges, as well as the conservative decisions of the Court, do not support the view that this Court will permit itself to become embroiled in "political" as distinguished from "legal" disputes. And this is true, despite the fact that, as every lawyer knows, there is no ultimate line dividing legal from political matters. The record of this Court is adequate evidence of its consistent refusal to enlarge its own jurisdiction by a judicial *tour de force*. This is a sound reason for dismissing as unfounded the fears of those who seek to retain the amendment.

Alternate Proposals

The students of repeal have suggested alternatives to the present

reservation. Professor Louis B. Sohn of the Harvard Law School has suggested that the entire American declaration might be modified so that the Court might take jurisdiction in matters affecting injuries to persons and property, treaty interpretation, and disputes among NATO countries.[15] These suggestions could be implemented without amendment of the 1946 declaration. He also proposes four ways whereby the Connally amendment might be revised. First, the entire amendment could be omitted. Second, it could be retained but limited to "matters which have been traditionally considered by the United States as matters within the domestic jurisdiction of the United States."[16] Or, the declaration could contain a long list of matters considered by the United States as essentially domestic. Finally, he suggests that the list of reserved matters could be open-ended and tied to a clause making reference to "any other" matters which the United States considers to be within the traditional reference of domestic matters.

The August, 1959, Report of American Bar Association Committee on the Self-Judging Aspect of the United State's Domestic Reservation also pointed up some worthwhile alternatives to the amendment. In addition to those suggested by Sohn, it placed emphasis upon the possibility that the Court could be required to make use of American, or other specified, precedents respecting what is or what is not a matter of domestic jurisdiction. Another suggestion related to retention by the United States of the power to determine what constitutes a domestic matter with the assurance that this power would not be exercised unless important and vital American interests were at stake or unless existing American precedents regarded the subject as being exclusively national in character.[17]

Another suggestion has been to follow a fairly common procedure whereby the Court's jurisdiction would be established through a series of bilateral agreements. Such treaties would not include a self-judging reservation but would limit the jurisdiction of the Court to specified types of disputes. This suggestion, which possesses some theoretical merit, would have to be proofed against misfire through the most-favored nation concept.

Another suggestion is that states be permitted to confer on the Court compulsory jurisdiction to resolve disputes growing out of treaty interpretation, and that this jurisdiction be not subject to national reservations. Probably the same result could be achieved without difficulty if a state were simply to make a limited declaration respecting the subjects already contained in Article 36 (2) of the Statute. It will be recalled that treaty interpretation is one such subject.

Conclusion

From the foregoing it will be seen that the advocates of repeal of the Connally amendment display a wholesome confidence in the technical competence of the Court and in the judicial quality of its judges. They contend that the Court would construe "domestic jurisdiction" in a manner not adverse to the vital interests of the United States. Those who urge the retention of the reservation are influenced by the fear of possible harm to

[15] Louis B. Sohn, "International Tribunals: Past, Present and Future," 46 *American Bar Association Journal*, pp. 25-26, (Jan. 1960).

[16] *Ibid.*, p. 26.

[17] International and Comparative Law Report, *op. cit.*, pp. 57-59.

the national interest if the Court is permitted to determine specific instances of "domestic jurisdiction." Both seek to protect and advance the national interest, and both have different views as how this may be achieved.

It is clear that the age-old dilemma confronting national states respecting "going-it-alone" or reasonable participation in international institutions still exists. The dilemma is particularly acute when one of the alternatives is to vest an international court with jurisdiction to resolve a dispute which may affect important interests of the nation. Since the Court is empowered to resolve *any* case referred to it by all of the parties, there is no doubt as to the capability of the Court in this regard. Thus, practical alternatives to the use of the Court would seem to include a willingness to let the dispute drag along in the hope that in the course of time it would either resolve itself or go away, that normal diplomatic means would suffice, and on the other hand, the possibility that the dispute would be resolved not by judicial or diplomatic methods but by recourse to self-help, illegal though the last mentioned possibility is under the Charter.

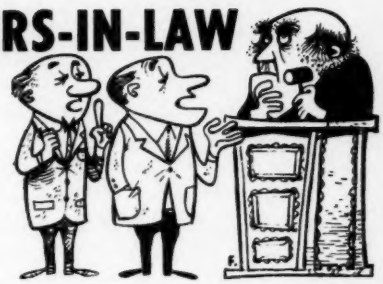
Were there only two nations on the Earth, the foregoing peaceful alternatives might be acceptable. However, realism requires one to acknowledge that the disputes of even a few nations do have a direct impact upon the safety and welfare of the other members of the world community. Thus, the non-disputants as well as the disputants, have a vital interest in the peaceful resolution of discord, including in particular those subjects which fall within the area of international legal disputes.

Our generation is vitally concerned with achieving world peace through world law. The rule of law in international affairs is exciting the imaginations and the energies of lawyers and statesmen throughout the world. An almost universal demand is heard for the effective use of international legal institutions, of which the International Court of Justice is a primary illustration.

In this context it is highly desirable for nations to accept the very broadest jurisdiction of the Court consistent with their vital interests, bearing in mind that their truly vital interests require recourse to law rather than to force for the settlement of legal problems. With these considerations in mind, including the present wide challenges to Democracy, it is clear that the United States is presenting a poor example to a bi-polar and ideologically oriented world when it establishes and maintains unnecessary reservations to the compulsory jurisdiction of the Court. The vital interests of the nation—the rule of law and international respect—can best be served through the repeal of the Connally amendment.

The amendment is a self-imposed roadblock to progress in the affairs of nations. The case for repeal is based on sound reasons. Reasonable alternatives exist. Yet, repeal would create no panacea. It would be but one of many steps which Americans must take upon a long hard road. With the repeal of the amendment the work and prestige of the Court is bound to increase. This will contribute materially to the progressive growth of international law and to the rule of law in world affairs. To serve these ends American leadership is confronted with a timely and an impressive challenge.

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

Firm Fun

» » ONE OF THE INDISPENSABLE desk books for the Southern California lawyer is the Directory of Attorneys published annually by Parker & Son Publications, Inc. A new feature of the 1960 edition, as probably everybody has noted by this time, is that the name of each member of the Los Angeles County Bar Association is preceded by an asterisk.

In thumbing through the new Parker directory we were pleased to see that the firm of ARGUE & ARGUE is still listed, but regret to observe that one of its members is unasterisked. Their firm name is perhaps even more appropriate in our profession than that of the old San Francisco firm of AMEND & AMEND.

Some years ago we were told about a law firm with an engaging name that went something like this: DILLEY, DALLY, DOOLITTLE & STAHL. Our informant assured us it was genuine. We forget in what city it was supposed to be carrying on its aggressive practice and we never checked up on it in line with our policy of never (i.e., seldom) looking a good story in the facts. Of course, it's just possible that four men so named *could* be teamed up in the practice of the law somewhere in these United States.

For that matter, if the lawyers listed in Parker's directory had happened to get together in just the right combinations, we could have some interesting firm names in this community, and one of them could be DILLEY, DALLY & STAHL. We don't seem to have a Doolittle, or do we? A few others could be: HOPE & PRAY; HUNT & PECK; BECK & CALL; LOVE, DARLING & BLISS. Three recent admittees could (but probably wouldn't) hang out their shingle emblazoned with GREEN, PEASE & YOUNGER.

BURY, COFFIN & GRAVES should do well in the probate field; and SHIPMAN, STERN & SPAR in admiralty, although KEEL, MAST & ANKER would give them plenty of competition.

HYER, FEE & BIGGER, along with CHARGIN, MOORE & MOORE, might make the most money, but HIGH, PRICE & COSTLEY should be right up there with them. Or would prospective clients be scared away and go instead to LOW, BILLS & NUNN?

Should a firm be accused of unethical advertising just for using its own name? Consider these: SAGE & SEARS; SMART & WYSE; KEEN, MINDS & NOBLE; FINE, WORKMAN & STAFF; BEST, LAWYER & BIGGERSTAFF; WORKS, SWIFT, LONG & HART; STERLING, WORTH & VIRTUE.

The careful clients might gravitate toward THRIFT & CAUTION (Prudence Thrift, that is) and the more adventurous to WILDE & WILDER.

DAY & KNIGHT; WYNN & LUCE; FIFE & DRUMM; JUDGE & JURY; BLACK, WHITE

& GRAY; BEERY, BREWER, LICKER & STEIN; SWING, MUSICK & LIGHTFOOT; BULL, SESSIONS & GASS; FLYNN, FLAMM, PETTY, FOGG & DICKER. . . . There's really no end to this. Send us your favorite firm name. The possibilities are limitless, so just to add an element of self-restraint, use only actual names found in Parker's 1960 compendium.

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"Lawyers of Los Angeles"

An order for a copy of "Lawyers of Los Angeles" recently received from the California Department of Justice indicates that the purchase is to be charged to its "Criminal Equipment" allotment.

As you should know by this time, "Lawyers of Los Angeles" is the lively history of the practice of law in Los Angeles from the early, turbulent days of the pueblo, as well as the story of our own Association from its conception in the 1870's. W. W. Robinson is the author and our Association is the publisher.

By the way: Have you got your copy of "Lawyers of Los Angeles" yet? If not, better hurry. It has received handsome reviews across the country and some day it could be a collector's item. Send your order, together with a check for $7.80, to The Ward Ritchie Press, 1932 Hyperion Avenue, Los Angeles 27. The $7.80 includes the sales tax.

Incidentally, we noted that the purchase order from the California Department of Justice called for the payment of the sales tax by it just like any other purchaser. Only difference is, we suppose, that the State gets three-fourths of the tax back. We wonder if that's enough to pay for the extra bookkeeping involved.